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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of 2004, 2005, 2006,	)	Docket No. 2012-6 CRB CD
2007, 2008 and 2009 Cable	)	2004-2009 (Phase II)
Royalty Funds	)	
	)	
In the Matter of	)	
	)	
Distribution of 1999-2009 Satellite	)	Docket No. 2012-7 CRB SD
Royalty Funds	)	1999-2009 (Phase II)
	)	

INDEPENDENT PRODUCERS GROUP'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF PROCEEDINGS PENDING RESOLUTION OF *WORLDWIDE SUBSIDY GROUP V. HAYDEN*

Brian D. Boydston, Esq.
Pick & Boydston, LLP
10786 Le Conte Ave.
Los Angeles, CA 90024
(213)624-1996
brianb@ix.netcom.com

Attorneys for Independent Producers Group

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In response to IPG's *Emergency Motion for Stay*, the MPAA and SDC submit a brief that is substantially similar to a brief filed by the SDC in U.S. District Court in opposition to IPG's motion for temporary restraining order in the matter *Worldwide Subsidy Group v. Hayden* (the "*Hayden* action"). In opposition to IPG's motion to stay, those parties walk through the various criteria by which a temporary restraining order should issue.

A. THE MPAA/SDC ADDRESS IRRELEVANT CRITERIA INAPPLICABLE TO WHETHER A MOTION TO STAY SHOULD ISSUE IN THESE PROCEEDINGS.

As a rather apparent observation, the standards and criteria for imposition of a *temporary restraining order* have never been the criteria required for a stay of CRB proceedings. Prior stays issued by the CRB such as those cited by IPG in its motion, were based on more practical concerns regarding the efficiency of staying particular proceedings that might be influenced by outside legal actions. By their opposition brief, the MPAA/SDC attempt to draw the Judges into making determinations on which the Judges have no legal authority to rule, e.g., whether the U.S. District Court has jurisdiction to preside over the *Hayden* action, and whether IPG has a likelihood of success on the merits of such action.

The fact that it is the CRB's determinations that are under review in the action, and that it is the CRB that is a defendant in the action, already reveals the Judges' position as to their own rulings. Any discussion by the MPAA/SDC attempting to convince the Judges that their prior determinations are correct is the equivalent of asking

a court to rule whether its own rulings are rational or supportable by law. Courts issuing rulings do not sit in review of their own rulings.

A. THE DISTRICT COURT RETAINS JURISDICTION OVER THIS MATTER, AS DEMONSTRATED BY PRIOR ACTIONS BEFORE THIS COURT.

Notwithstanding, the MPAA/SDC arguments fail, such as their contention that the District Court lacks jurisdiction to sit in review of any aspect of this proceeding. Indeed, the MPAA/SDC characterizes the Judges' refusal to acknowledge ninety-nine (99) validly filed claims at the outset of these proceedings as mere interlocutory orders that are not allowed review until CRB distribution proceedings have concluded *without* the submission of any evidence relating to the value of such validly filed claims.

The MPAA/SDC propose that the proceedings move forward, with the various parties' acquisition of data, engagement of expert witnesses, exchange of discovery, motion and trial proceedings, and to have a decision rendered by the Judges, all for the purpose of addressing the allocation of collected royalties that will be nullified and rendered moot if *any* of the ninety-nine IPG-represented claims are ultimately found to have been inappropriately refused acknowledgment or inappropriately dismissed. A more pointless exercise could not be imagined. According to the MPAA/SDC, IPG has an adequate remedy before the U.S. Court of Appeals for the District of Columbia under 17 U.S.C. § 803(d).[1]

[1] The MPAA/SDC contention is questionable. Appeal to the Court of Appeals under 17 U.S.C. § 803(d) is limited to "any aggrieved participant in the proceeding . . . who fully participated in the proceeding . . ." The language of such provision suggests that any

The MPAA/SDC assert this position despite the fact that two separate actions seeking substantially similar remedies, for substantially similar acts, under a substantially similar statutory scheme, have successfully been filed against the Librarian of Congress and the U.S. Copyright Office without any challenge to or issue with the jurisdiction of the District Court. Specifically, in the matters of *Universal City Studios LLP v. Peters* (U.S.D.C. No. 03-1082 (RMC)), and *Metro Goldwyn-Mayer Studios, Inc. v. Peters* (U.S.D.C. No. 03-179 (RMC)), actions were brought by two corporate entities for the Librarian's refusal to acknowledge the timeliness of filed claims. Rulings on those actions were forthcoming by the District Court (see **Exhibits 1 and 2**), those matters were appealed to the Court of Appeals for the District of Columbia, and further rulings issued (see **Exhibit 3**, *Universal City Studios LLP v. Peters* 402 F.3d 1238 (D.C. Cir. 2005)). At no time was there an issue that the District Court was the appropriate court for review of the Librarian's refusal to acknowledge the filed claims.

The most significant basis by which the *Universal* and *Metro Goldwyn-Mayer Studios* cases may be distinguished is by the fact that they were brought prior to establishment of the Copyright Royalty Board under the current incarnation of 17 U.S.C. §§ 801, *et seq*. Notwithstanding, the versions of those statutes pre- and post- creation of the Copyright Royalty Board are identical for all purposes herein, as the pre-2005 version

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claimant whose claim was not recognized by the CRB at the outset, and was thereby prohibited from "fully participating" in the proceeding, would have no recourse to the Court of Appeals, thereby corroborating IPG's position that the CRB's refusal to acknowledge a validly filed claim is a matter subject to the jurisdiction of the U.S. District Court.

of those statutes affords the CRB's predecessor *the identical authority* "[t]o accept or reject royalty claims filed under sections 111, 119 . . . on the basis of timeliness or the failure to establish the basis for a claim",[2] and affords identical appeal to the Court of Appeals for the District of Columbia following the issuance and publication of a "final determination" in the Federal Register.[3] Conveniently, nowhere do the MPAA/SDC address what possible jurisdictional distinction there could be between the actions brought by *Universal* and *Metro Goldwyn-Mayer Studios* and the *Hayden* action.

In fact, the scenario in the *Hayden* action is a more compelling argument for jurisdiction of the U.S. District Court. In *Universal* and *Metro Goldwyn-Mayer Studios*, the issue was review of the Librarian's rejection of claims based on the timeliness of those submissions, and the Librarian had clear statutory authority to render such "timeliness" determination under the previously existing 17 U.S.C. § 801(c)(2) (enacted Dec. 17, 1993). By contrast, in the *Hayden* action the refusal of the Judges to acknowledge fifty-one (51) validly filed claims as a discovery sanction is not pursuant to its authority "[t]o accept or reject royalty claims filed under sections 111, 119 . . . on the basis of *timeliness* or the failure to *establish the basis* for a claim". Rather, the Judges refused to acknowledge such claims on grounds beyond any articulated authority of the CRB, or any party, to do so. Literally *no statutory authority exists for the CRB to disregard validly filed claims as a discovery sanction*, as was done in this proceeding.

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[2] *Cf.* 17 U.S.C. § 801(c)(2) (enacted Dec. 17, 1993) *with* 17 U.S.C. § 801(b)(4) (enacted Nov. 30, 2004).

B. THE MPAA/SDC SUMMARILY DISPUTE THE SIGNIFICANCE OF IPG-PRESENTED FACTS SET FORTH IN THE *HAYDEN* PLEADINGS, RELYING EXCLUSIVELY ON THE "DEFERENTIAL" STANDARD ACCORDED TO CRB FINDINGS.

In its attempt to challenge that IPG has a likelihood of success on the merits, the MPAA/SDC make no attempt to address the actual facts set forth in the *Hayden* pleadings, relying entirely on the deferential standard accorded to CRB findings. As though it should elevate its argument, the MPAA/SDC summarily characterize the challenged CRB findings as a "blatant discovery violation" and "strong evidence of perjury and false claims". The *Hayden* pleadings, which set forth the evidence that was before the CRB, paints a very different picture.

Of course, there are limits to the deference accorded to the CRB, as displayed by the multiple instances in which *the SDC* has sought review of CRB rulings, and the multiple instances in which those rulings have been reversed. *Settling Devotional Claimants v. Copyright Royalty Board* (August 14, 2015) (U.S.D.C.; Case no. 13-1276); *Settling Devotional Claimants v. Copyright Royalty Board* (February 10, 2017) (U.S.D.C.; Case no. 15-1084). Clearly, a standard of deference is not a cloak of invulnerability, and while suggested by the MPAA/SDC here, such is contrary to the position frequently advocated by the SDC to the Court of Appeals.

Nevertheless, a portion of the facts set forth in the *Hayden* pleadings (which facts the MPAA/SDC disregard) demonstrate that in the issuance of its discovery sanction

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[3] *Cf.* 17 U.S.C. § 802(g) (enacted Dec. 17, 1993) *with* 17 U.S.C. § 803(d)(1) (enacted Nov. 30, 2004).

dismissing fifty-one royalty claims from seventeen royalty pools, worth tens of millions of dollars, the Judges repeatedly disregarded the fact that a discovery sanction cannot issue if there has been no "prejudice" to the complaining party.[4] As frequently noted in IPG's briefs, the SDC sought the discovery sanction but was a firsthand recipient of the 2005 "David Joe email" that was the basis of the discovery sanction, had the email for a decade, had introduced the email into evidence in prior CRB proceedings, withheld later communications reflecting the insignificance of the email, and such email was not even responsive to the SDC discovery request as previously tailored by prior rulings of the Judges.

Notably, the MPAA/SDC *do not even challenge the veracity of these facts*, either in this opposition brief or the SDC's opposition to IPG's motion for temporary restraining order.

On what basis the MPAA/SDC can claim that IPG will not succeed on the facts is bewildering when, as a matter of law, the Judges were precluded from issuing a discovery sanction, particularly a sanction of such draconian consequence.

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[4] Due process requirements limit the inherent power to impose sanctions. *See Maez v. Bridgestone Firestone North American Tire, LLC*, 533 F.3d 578, 593-594 (7th Cir. 2008). Where a claim is dismissed as a sanction, case law holds that such a harsh remedy should be imposed only in "extreme circumstances", and that it is an abuse of discretion to dismiss an action without (1) warning of the possibility of dismissal and (2) trying less drastic alternatives, ***particularly in the absence of prejudice to the objecting party*** or other exceptional circumstances. *See Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1429-1430, (9th Cir. 1990).

C. IPG AND ITS REPRESENTED CLAIMANTS WILL SUFFER IMMEDIATE IRREPARABLE INJURY AND PREJUDICE; AN EXIGENCY EXISTS.

In seeming disregard of the facts, the MPAA/SDC blithely contend that "any injury is reparable". Of course, the premise of the MPAA/SDC argument is that the very issues raised in the *Hayden* action will not be reviewed by the District Court under any circumstances, but only by the Court of Appeals. Based on this incorrect presumption, the MPAA/SDC aver that IPG will eventually, *someday*, get its day in court.

If IPG's ninety-nine (99) claimant claims are not allowed to be considered as part of the ongoing CRB proceedings, a determination will issue by the Judges and royalties will be awarded without the ability of IPG to submit a shred of evidence regarding the value of those claims. This proceeding has already been tried once, is now under remand for a second trial, and if IPG prevails in the *Hayden* action and a stay is not immediately issued, a third trial will be required.

Ironically, the MPAA/SDC make the same oft-repeated argument, that a stay of proceedings will only serve to delay a final determination, and delay distribution of royalties to entitled claimants. As the Judges are aware, these proceedings relate to royalties collected by the Copyright Office as far back as 1999, i.e., *seventeen years ago*. Despite being organized pursuant to 2004 legislation, the CRB did not initiate proceedings relating to the distribution of such royalties until September 2013, *nine years later*. After all parties fully participated in those proceedings, and after a five-day hearing in April 2015, the CRB issued its determination thereon until May 2016, *thirteen*

months later, remanding the proceedings back to itself for a do-over. See *Order Reopening Record and Scheduling Further Proceedings* (May 4, 2016). Further, both the MPAA and SDC have been advanced substantial percentages of their claims by the Judges. As a result, to suggest that there remains an urgency to get funds to the rightful claimants after the foregoing delays contradicts all prior actions of the CRB.

Along similar lines, the MPAA/SDC make much of the timing of IPG's complaint, noting that the complained-of acts, i.e., the rulings of the Judges, were first initially issued on March 15, 2015. Good reason exists for IPG's cautionary delay in the filing of the *Hayden* suit. In the 2010-2013 cable and 2010-2013 satellite proceedings, similar arguments were being made against IPG-represented interests, as part of the claims challenge process. Per the required schedule imposed by the Judges, briefing on such claims challenge process concluded on November 15, 2016, and the Judges were to have an evidentiary hearing on that briefing on January 10, 2017. Notwithstanding, the Judges issued an order on December 13, 2016, asserting that an evidentiary hearing would not occur unless deemed necessary, then took the matters under submission.

Not until October 23, 2017, i.e., eleven months after submission of the last required briefing, did the Judges issue a much-anticipated ruling in CRB Docket Nos. 14-0010 CD 2010-2013 and 14-0011 SD 2010-2013, which rulings are inextricably related to the Judges' ruling of March 15, 2015 in this proceeding. Quite simply, had the Judges addressed the claims challenge process sooner than eleven months, IPG would have proceeded with the *Hayden* action earlier.

In sum, no doubt for good reasons beyond the Judge's control, the adjudication of this matter has never been processed in a fashion consistent with the concept that "time is of the essence", rendering any such claim highly dubious and at odds with the facts and exigencies facing this adjudication.

The irony of the MPAA/SDC argument should be apparent. IPG is specifically trying to *avoid* piecemeal litigation. The process advocated by IPG, i.e., resolution of the issues raised by the *Hayden* action, *guarantees* there will be no piecemeal litigation. The process advocated by the MPAA/SDC, by contrast, seeks to have the parties move forward with proceedings that will definitively be mooted if IPG prevails with *any* of its arguments in the *Hayden* action. No more obvious display of a "lack of public interest" could exist than with the alternative advocated by the MPAA/SDC.

Beyond the foregoing, review of the MPAA/SDC opposition brief reflects speculation as to an ulterior motive for IPG's motion for temporary restraining order. According to the MPAA/SDC, IPG seeks the gratuitous delay of all proceedings and cites to a communication between IPG counsel and counsel for the MPAA and SDC. See Exhibit A to MPAA/SDC opposition. Conveniently, the MPAA/SDC omit the very phrase in that communication that *expressly* sets forth IPG's rationale for stipulating to a delay in the filing of a rebuttal brief in this proceeding:

> "*In order to avoid any accusation that WSG sought to have the adverse parties 'show their hand'*, we are informing you that WSG will not challenge any delayed filing of a written rebuttal statement by either the MPAA or SDC pending a determination by the U.S. District Court as to whether a TRO will issue, or a ruling by the CRB on WSG's motion for a stay." (emphasis added).

Obviously, if IPG had sat silent, the MPAA/SDC would now be accusing IPG of seeking to have such parties "show their hand" in these proceedings even though the District Court might have immediately issued an injunction pending resolution of the *Hayden* action. No reason is stated as to *why* IPG would seek to gratuitously delay all proceedings. In fact, IPG's motive for seeking a stay is apparent – to assure that IPG will be allowed to present evidence as to the value of the claims that IPG contends were inappropriately disregarded or dismissed by the Judges, and to avoid the possibility that the parties will have to engage in a *third* round of proceedings before the CRB if IPG demonstrates that *any* of the ninety-nine claims should have been considered by the Judges. No ulterior motive exists. IPG transparently seeks the efficient resolution of proceedings in order that the parties not have to repeatedly return before the CRB once the Judges' rulings are remedied following review.

In previous circumstances, the CRB has similarly stayed proceedings pending the outcome of litigation concerning the positions of the parties and claims at issue in pending distribution proceedings. See, e.g., **Exhibit 4**, Docket 2008-1 CRB CD 98-99 (*Sixth Order Continuing Stay of Proceedings*). Then, as now, there appeared to be little purpose in adjudicating claims before the CRB which could be significantly altered by outside litigation.

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CONCLUSION

For the foregoing reasons, IPG moves that the Judges order these proceedings stayed until further notice.

Respectfully submitted,

Dated: December 22, 2017

_____/s/_____
Brian D. Boydston, Esq.
California State Bar No. 155614

PICK & BOYDSTON, LLP
10786 Le Conte Ave.
Los Angeles, California 90024
Telephone: (213)624-1996
Facsimile: (213)624-9073
Email: brianb@ix.netcom.com

Attorneys for Independent Producers Group

CERTIFICATE OF SERVICE

I hereby certify that on this 22th day of December, 2017, a copy of the foregoing was sent by email to the parties listed on the attached Service List, and served by the eCRB system.

_____/s/_____
Brian D. Boydston, Esq.

DEVOTIONAL CLAIMANTS:

Clifford M. Harrington
Matthew J. MacLean
Victoria N. Lynch
Pillsbury, Winthrop, et al.
P.O. Box 57197
Washington, D.C. 20036-9997

MPAA-REPRESENTED PROGRAM SUPPLIERS:

Gregory O. Olaniran, Esq.
Lucy Holmes Plovnick Esq.
Mitchell, Silberberg & Knupp LLP
1818 N Street, N.W., 8th Floor
Washington, D.C. 20036

Certificate of Service

I hereby certify that on Friday, December 22, 2017 I provided a true and correct copy of the INDEPENDENT PRODUCERS GROUP'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF PROCEEDINGS PENDING RESOLUTION OF WORLDWIDE SUBSIDY GROUP V. HAYDEN to the following:

MPAA-Represented Program Suppliers, represented by Alesha M Dominique served via Electronic Service at amd@msk.com

Devotional Claimants, represented by Clifford M Harrington served via Electronic Service at clifford.harrington@pillsburylaw.com

Signed: /s/ Brian D Boydston